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No. 625

Brf. of Blair for Respondent

Supreme Court, U.S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 625

THE HARTFORD FIRE INSURANCE COMPANY, Petitioner,

vs.

ALBERT A. WILSON AND JOHN B. LARNER,
Trustees, Respondents.

Brief on Behalf of Respondents to Petition for a writ of Certiorari to the Court of Appeals of the District of Columbia.

HENRY P. BLAIR,
Counsel for Respondent.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No.

THE HARTFORD FIRE INSURANCE COMPANY, Petitioner,

vs.

ALBERT A. WILSON AND JOHN B. LARNER,
Trustees, Respondents.

Brief on Behalf of Respondents to Petition for a writ of Certiorari to the Court of Appeals of the District of Columbia.

ARGUMENT.

This is a petition for a writ of certiorari to the Court of Appeals of the District of Columbia to bring here a case involving two insurance policies of one thousand dollars each, which case has already been twice argued before the Court of Appeals, as well as having been originally heard by the trial justice of the Supreme Court of the District of Columbia.

Concerning the granting of this writ this Court has said in Forsyth *vs.* Hammond, 166 U. S., 506, 514:

"And further, that while this power is coextensive "with all possible necessities and sufficient to secure to "this court a final control over the litigation in all the "courts of appeal, it is a power which will be *sparingly* "exercised, and only when the circumstances of the case "satisfy us that the importance of the question involved, "the necessity of avoiding conflict between two or more "courts of appeal, or between courts of appeal and the "courts of a State, or some matter affecting the interests "of this nation in its internal or external relations, de- "mands such exercise."

The only ground upon which petitioner can attempt to stand in this Court is "importance of the question involved." It would hardly seem that this proposition could be seriously urged. The amount is admitted to be unimportant and the argument is made as to the far reaching effects of the decision. This is magnified and the decision itself twisted by the specious argument of the learned counsel. The effect of the decision of the Court of Appeals is to hold that when an insurance company *issues* a policy and *carries* a risk which requires *cancellation* and *waiver of conditions in that policy as to cancellation* in order to stop the *running of the risk*, then a policy has been issued and, subject to its terms it becomes a valid, subsisting obligation. They hold that the insurance company cannot issue a policy for the definite *term* of one year and by parol modify the conditions of that policy unless they endorse the modifications thereon in accordance with the provisions of the policy itself. It was admitted that this policy was operative from its date for ten days at least and that had a fire occurred during that period, the company would have been bound to pay the loss. It is also admitted that the risk takes effect as of the date of the policy, if it is ever in force.

The decision of the Court of Appeals merely holds that you cannot a deliver valid, subsisting risk, which takes effect at the time of delivery, and then, although the risk is effective and the policy admittedly *in force*, attach conditions to *that*

delivery in a manner contrary to the provisions of the *admittedly existing contract*.

Counsel do not wish to weary the Court with a discussion of the case but respectfully submit herewith the briefs used at the two hearings below with the suggestion that the importance and magnitude of this case only occurred to petitioner's counsel when the Court's decisions were contrary to their contentions. This case has twice been patiently heard by the Court of Appeals, and although the learned chief justice has dissented, yet a majority opinion has twice sustained the contention of this respondent that upon the agreed facts in this case a *valid, subsisting contract was delivered*, which could only be modified by its own terms and conditions, which admittedly was not done in this case.

There is certainly nothing in such a holding in conflict with any decision of this Court or with any possible contention or view of the law. Neither Burke *vs.* Dulany, 153 U. S., 228, nor Hanickell *vs.* New York Life Ins. Co., 111 N. Y., 399, hold the contrary of this proposition.

The Court of Apppeals says (page 25 of the petition herein):

> "From the terms of the agreed statement, it appears "that the local agent of the insurer, who was possessed "of signed policies and authorized to fill the blanks, de- "liver them, and bind his principal thereby, *regarded* "*the polices in force*, at least, until disapproved by the "company, *and therefore subject to the reserved power of* "*cancellation*, notwithstanding the conditional delivery, "hereafter to be considered separately."

In this is applied the principle that the risk having *taken effect*, took *effect* subject to the provisions and conditions of the contract and that modifications of a *subsisting* written contract cannot be shown by parol, contrary to the written provisions of that contract. The learned chief justice denies

the *existence* of the contract and his opinion is founded on that proposition, which it is respectfully submitted is contrary to the opinion of the majority of the Court of Appeals and to the reasonable and proper construction to be given to the agreed case.

There appears to be no error in the decision of the Court below nor does there appear to be any question of magnitude involved in the case. The writ should be denied.

Respectfully submitted.

HENRY P. BLAIR,

Counsel for Respondent.

BRIEF ON ORIGINAL HEARING.

IN THE

Court of Appeals of the District of Columbia.

January Term, 1900.

No. 959.

ALBERT A. WILSON and JOHN B. LARNER, Trustees, Appellants,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

STATEMENT OF THE CASE.

In April, 1895, the Ivy City Brick Company, through its Treasurer, authorized Tyler & Rutherford, Real Estate and Insurance Brokers in the City of Washington, to place insurance on the plant of the Company situated at Ivy City, D. C., to the amount of $10,000. Thomas F. Barrett, the agent of the Hartford Fire Insurance Company, the appellee herein, wrote the two policies involved in this suit and delivered them to Tyler & Rutherford. According to the agreed case at the time of this delivery Barrett required that Tyler & Rutherford should hold the policies and not deliver them to their principal, as his authority to write the risk was doubted by him, and that the policy should be held subject to immediate cancellation, the condition in the policy providing for five days' notice being waived These policies bear date April 17, 1895, which was the date of

the transaction between the parties, and under their terms the loss, if any, was payable to Albert A. Wilson and John B. Larner, Trustees, as interest might appear, said Wilson and Larner, the plaintiffs below and the appellants here, being trustees under a Deed of Trust from the Ivy City Brick Company to secure a loan on the property of the said corporation.

On the 27th of April a special agent of the appellee, for the first time since the writing of the risk, visited Washington on an inspection trip and refused the risk and ordered the cancellation of the policies, giving this information to a member of the firm of Tyler & Rutherford who directed him to send to the office and get the policies. Various trips were made for the same but the policies were not obtained from Tyler & Rutherford. An entry was made on the books of the Hartford Fire Insurance Company kept by Barrett to the effect that the policies were canceled by order of the Company (R., p. 7), and as between Tyler & Rutherford and Barrett in a subsequent settlement of accounts these policies were not considered. All these facts were unknown to the insured or the appellants until after the fire occurred. On the 16th of May, Tyler & Rutherford delivered to the Treasurer of the Company policies to the amount of $10,000, including among the same the two policies involved in this suit (R., p. 8), and rendered a bill for the same in which a charge was made for the premiums on these two policies (R., p. 10). At the time the policies were delivered and the bill rendered, the Treasurer of the insured agreed to pay the account as rendered on May 27th following (R., p. 8).

About one o'clock on the morning of May 17th the fire occurred, and subsequently, during the morning of that day, Tyler & Rutherford demanded the return of these policies which was refused under instructions from the insured, and, no settlement being reached, suit was eventually instituted.

It is agreed that the loss was total and any irregularities or laches as to proceedings subsequent to the fire are waived and it is further agreed that if the appellants are entitled to recover,

they are entitled to the face value of the policies with interest from the 7th of October, 1895, and costs. (R , p. 9.)

The case was argued and submitted to the Court below on the agreed statement of facts and the Court found for the defendant for costs in accordance with said agreed case. Exceptions were duly reserved to that judgment and an appeal taken to this Court.

Assignment of Errors.

1. The Court below erred in giving judgment for the appellee on the agreed case filed herein.

2. The Court below erred in not giving judgment for the appellants.

Argument.

Barrett was the general agent of the Company at the Washington, D. C., office whose signature was necessary to every policy issued by that office. When the policies in suit were countersigned by Barrett and delivered to Tyler & Rutherford they became *existing* policies. The agreed case does not deny the authority of Barrett to issue these policies and it does not appear (nor was it the fact) that he was without such authority. We have therefore on April 17, 1895, two valid policies in the hands of Tyler & Rutherford, the *agents to procure insurance* for the Ivy City Brick Company.

The contention is made that the delivery to Tyler & Rutherford was *conditional* and that there was a waiver by them of the provision for five days' notice of cancellation contained in the policy. The argument that a provision of the policy was to be waived involves the admission that the policy containing the provision was in force, for there could be no waiver of a provision not in force; nor could there be *conditional* delivery of a policy actually in force and subject to *cancellation*. It further appears from the agreed case that the *special agent* of the insurer on his first inspection visit to Washington after the writ-

ing of this risk *ordered its cancellation*. This was verbal and there is no written evidence of any part of this transaction, either at the time the policies were delivered or subsequently, *except the policies themselves*. The final paragraph of the policy provides among other things:

> "This policy is made and accepted subject to the fore-
> "going stipulations and conditions, together with such
> "other provisions, agreements, or conditions as may be in-
> "dorsed hereon or added hereto."

The Company has required that any *other* provisions, agreements, or conditions be indorsed on the policy or added thereto. The policy is theirs and the language of a written instrument is to be taken most strongly against the party preparing the same.

The policy also contains the following provision:

> "This policy shall be canceled at any time at the request
> "of the insured; or by the Company by giving five days'
> "notice of such cancellation."

By the terms of the insurer's policy the risk was made and accepted subject to *this* stipulation and there was no other provision altering the same indorsed on the policy or added thereto. It was in full force.

The date of the policy was April 17, and the attempted cancellation was April 27. It is not to be doubted but that the Company would have been liable, had the loss occurred within that period. The delivery was not a *conditional* one, therefore, for the language of the policy would require such condition to be indorsed thereon or added thereto. It was in force, for an order of cancellation was made by the special agent of the Company and the bill of Tyler & Rutherford (R., p. 10) charges the premium from April 17.

An attempt to cancel involves the admission of the *existence* of the policy.

Aetna Insurance Co., *vs.* Maguire, 51 Ill., 342, 347.

If this policy was not in force why should it be *dated* April 17th and be *canceled* April 27th? Was it *conditioned* on the acceptance of the risk by the special agent, with the understanding that, if accepted, it should date *back* to the day of the alleged *conditional* delivery and the insured should pay premium for the time intervening between the date of the policy (which was the date of the alleged conditional delivery) and the date of approval of the risk, although during all that period, according to the present contention of the insurer, no liability attached under the policy because of the terms of the *verbal* contract between Barrett and Tyler & Rutherford. It is true that this time was only ten days in the present case. It might have been much longer. Had the special agent approved the risk at the end of such period the insurer's policy would then be made to cover a period during which (if the delivery were conditional) there had been no liability on the insurer, and the insured would pay premium for time not covered by the risk. Surely, neither Barrett nor Tyler & Rutherford were parties to any such fraud on the insured, and the only reasonable deduction from the circumstances attending the issuing of the policies is that the risk attached on April 17, 1895, the *written* date *in the policies* from which the insurer agreed to insure for *the term of one year* to the 17th day of April, 1896, at noon.

The authorities are conclusive that an agent *to procure* insurance, although by the terms of the policy made the agent of the insured, is not an agent for the purpose of receiving notice of cancellation.

Ins. Co. *vs.* Grave, 109 U. S., 278.
Hermann *vs.* Ins. Co., 100 N. Y., 411.
Assurance Society *vs.* Ins. Co., 84 Va., 116.
Assurance Co. *vs.* Cooper, 40 Pac. Rep., 147.
Mills Co. *vs.* Ins. Co., 125 Mass., 110.

An agreement to cancel does not affect the original contract.

Ins. Co. *vs.* Webster, 6 Wall., 129.

In that case the contract of insurance was executed and delivered. Afterwards a memorandum was signed by the assured to the effect that the insurance on the application was to take effect when approved by the general agent of the Company. He refused the risk and directed his agent to return the premium note and cancel the policy, of which facts the assured was not informed until after a loss occured. When the premuim note was tendered him he refused to receive it, and in an action on the policy the party insured was held entitled to recover for the loss, the agent having neither returned the note nor canceled the policy.

So, too, in the case at bar the contract of insurance was executed and delivered, for the delivery to Tyler & Rutherford of an *existing* policy was delivery to the insured. At the time of the fire the policies were in the possession of the insured, and not until *after* the fire did it have any knowledge of the *verbal* agreement between Barrett and Tyler & Rutherford. The insured never *signed* any memorandum. If the *written memorandum* in one case did not save the insurer from paying its losses, why should such force and effect be given in the present case to a *verbal agreement to which the insured was not a party.*

Under the terms of the policy notice of cancellation should have been given to the insured on the authority of the cases already cited and the following additional cases.

Ins. Co. *vs.* Raden, 87 Ala., 311.
Ins. Co. *vs.* Turnbull, 86 Ky., 230.
Ins. Co. *vs.* Nill, 114 Pa. St., 248.
White *vs.* Ins. Co., 120 Mass., 330.
Rothschild *vs.* Ins. Co., 74 Mo., 41.
Broadwater *vs.* Ins. Co., 34 Minn., 465.
Kehler *vs.* Ins. Co., 23 Fed. Rep., 709.
Adams *vs.* Ins. Co., 17 Fed. Rep., 630.

Two adjudged cases approach very closely to the case at bar and support the contention of the appellants in each instance.

In Assurance Company *vs.* Cooper, 40 Pac. Rep., 147, 149, agents represented insured and company. They were directed several days before the fire to cancel a policy of the insured in their possession. They served this notice on themselves and *canceled the policy*. The clause as to cancellation is similar to the one in the present case. Held, that they were not agents for the purpose of cancellation notice although they had possession of the policy in question.

In Mills Company *vs.* Insurance Company, 125 Mass., 110, plaintiff by treasurer applied to A who applied to B, of the firm of B & C, who could place risks in R. Co. and bind W. Co. B talked with C and placed risk in R. Co. and notified R. Co. November 1 of risk. November 2, six p. m., R. Co. notified B & C that the risk was declined and B, without notifying plaintiff, bound W. Co. Loss occurred between 11 and 12, night of November 2. In morning B went to his clerk and told him R. Co. had declined risk and instructed clerk to report risk to W. Co. B & C were both away that day and at time of conversation with clerk B was ignorant of fire. November 2 A went into office of B & C and reported fire and that policies were wanted and asked if policy was written for him. Clerk said, Yes, in R. Co , which had declined to take it and it was to be placed in W. Co., and asked A what to do. R. Co. policy was delivered to A who turned it over to plaintiff. Afterwards B & C tried to get plaintiff and A to return policy but they refused. R. Co. held liable.

The risk attached and the company were held liable because the *terms of the policy* were not observed in the *cancellation* of the risk, although policy was not *delivered* until *after* the fire. In the present case the risk attached and the company have never complied with the *terms of the policy* as to *cancellation* and the policy was delivered *before* the fire.

Notice to third parties to whom loss is made payable by the terms of the policy is necessary as well as notice to the assured.

Latin *vs.* Ins. Co., 45 N. J. Law, 453.

Where cancellation is ordered by the company and, through failure on the agent's part, it is not properly made, liability arises on the part of the agent to the company for such failure.

Franklin Ins. Co. *vs.* Sears, 21 Fed. Rep., 290.

It is, therefore, respectfully submitted that, on the agreed case and the authorities cited herein in support of the contention of the appellants, on April 17, 1895, the two policies delivered to Tyler & Rutherford became existing contracts of insurance subject to the terms and provisions contained in the policies, which terms and conditions were those prescribed by the insurer and which, therefore, are to be taken most strongly against it, and through failure on the part of the Company to comply with the terms of its own policy the insurer rather than the insured should suffer. Since the risk attached and the policies were operative, the insured was entitled to the five days' notice of cancellation which has never been received by it, nor have the assignees of the insured ever been notified of the cancellation of the policies. The policies being in force at the time of the fire it is respectfully submitted that there was error in the judgment of the Court below, which judgment should be here reversed and the case remanded, with instructions to enter judgment for the appellants in accordance with the stipulations of the agreed case.

The remedy of the insurer is properly by suit against its agent for failure to obey the instructions given him, and it is not equity that the insured should be deprived of the benefit of their policies because of the failure on the part of the insurer's agent to comply with the contract issued by him under his authority from the Company.

HENRY P. BLAIR,
CORCORAN THOM,
Attorneys for Appellants.

BRIEF ON RE-HEARING.

IN THE

Court of Appeals of the District of Columbia.

JANUARY TERM, 1901.

No. 959.

ALBERT A. WILSON and JOHN B. LARNER, Trustees,
Appellants,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

The motion for re-hearing in this case was based on two grounds: (1) that the point raised by the majority of the Court against the appellee was not argued at the hearing of the cause and is directly contrary to the contention of both the appellant and appellee, and (2) the illness of counsel. In presenting the argument for re-hearing, the counsel for the appellants desire to place on record the fact that the motion for re-hearing was unopposed because of the second reason advanced and not because of assent to any of the propositions advanced in connection with the first reason assigned and it seems only fair to us to add that the argument of the cause at the former hearing was proceeded with at the suggestion and insistence of the appellee's counsel who at that time engaged to take not over ten minutes of the time of this Court.

Counsel must decidedly dissent from the proposition that this case has been decided in this Court contrary to the contentions of the appellant. The proposition of the appellant

from the beginning has been that this was a valid subsisting contract, subject to the terms and conditions contained within the four corners of the paper, among which terms and conditions in the instrument prepared by the insurance company, and therefore to be taken most strongly against the appellee, occurs the clause, "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto." Such being the contract, it does not lie within the power of the party preparing the paper and by the countersigning of its agent issuing the same to vary or alter the terms and conditions of its own policy. There is not an adjudged case among all those cited or referred to by the distinguished counsel for the appellee which holds that there may be a delivery of a contract contrary to the provisions of that contract, and, with the indulgence of the Court, counsel will briefly discuss the case of Burke *vs.* Dulaney, 153 U. S., 228 and the cases cited therein, because it is the construction of this Court upon this case which is now advanced as error by the appellee on the motion for re-hearing.

Burke *vs.* Dulaney is a contention between the original parties to a promissory note and the note itself, of course, contains no clause requiring modification of its terms to be endorsed thereon or added thereto, yet the Court here holds that no agreement between the original parties could have been shown to the prejudice of an innocent holder for value.

In Ware *vs.* Allen, 128 U. S., 590, cited in Burke *vs.* Dulaney above, the Court held that the contract never went into effect, but so to hold in the case now before this Court would be to hold that the parties were without their insurance from the 17th of April to the 27th of April, and that all the action by Royce and Barrett with reference to cancellation was unnecessary, because if the policies sued on never went into effect there could be no occasion for either Royce

or Barrett doing anything in regard to them after their delivery to the agents to procure insurance.

In Pym *vs.* Campbell, 6 El. & Bl., 370, which is reviewed in Burke *vs.* Dulaney, it appears that the agreement between the plaintiff and defendant was subject to the approval of two engineers employed by the defendant before the same became operative, and that only one of the engineers ever gave his approval. It also shows that it was a matter of convenience in having the parties sign at different times in the absence of the two engineers, and that the signature of the defendant was distinctly given subject to the approval of the absent engineer who never did approve. This is a different case, as, in fact, are all the cases, where there is no clause requiring modification of the contract to be endorsed thereon or added thereto.

Wilson *vs.* Powers, 131 Mass., 539, also reviewed in Burke *vs.* Dulaney, was a suit on a promissory note which, of course, did not contain the clause relative to modification by endorsement thereon or addition thereto.

Benton *vs.* Martin, 52 N. Y., 570, and the other cases cited in Burke *vs.* Dulaney, all involve written instruments which do not contain the clause so frequently referred to and it is confidently asserted that in no instance has the rule been extended so far as to admit evidence to contradict the terms of a written agreement when the agreement itself specifically provides the only way in which any of its conditions may be altered or modified.

To hold in this case that there never was a valid subsisting contract is to hold that the signature of Barrett was ineffective to accomplish the stipulation of the policies to the effect that the countersigning by the agent made a valid and binding obligation. It is further to hold that the recital in the policy that in consideration of a premium the company did insure for the term of one year from the 17th of April is not a correct recital and is not valid It is fur-

ther to hold that this instrument prepared by the insurance company can be altered or modified or changed by conditions not endorsed thereon or added thereto. As counsel have previously intimated, we do not see what occasion there was for the special agent to refuse to carry a risk and reject it on behalf of his company and order the cancellation of policies which, according to the present contention of the appellee, never were in existence. The very language itself shows that there was but one construction in the minds of these parties at the time Barrett wrote these policies within his authority and that construction was to issue valid subsisting risks, but that this action was accompanied by an attempt to alter or change the conditions of the contract in a manner opposed to the terms and stipulations of the same. It is elemental law that this could not have been done.

The language of the Agreed Case on the question of the delivery of the policies is that the insurance company's agent stated that "he would *issue* policies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by the said Tyler & Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to *immediate cancellation* (the five days' notice in the policy conditions *being waived*) by notice that said company *rejected* the risk;" and in paragraph 4 of the Agreed Case the special agent of the Hartford "went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company refused to *carry* the risk, and ordered the *cancellation* of the said policies;" and in paragraph 6 of the Agreed Case recites that the company's local agent "immediately ordered the entry clerk to make the *customary* entry in such cases on the register where the policies were noted, 'canceled by order of the company,' which was ac-

cordingly done" (Record, page 7), and of all these facts the insured had no knowledge. If the contention that these policies *never were in force* be correct, it is for counsel to explain why the condition for *immediate cancellation* and *waiver* of five days' notice should be attached to the delivery of policies which did not exist.

This Court has held in its decision in this case and the motion for re-hearing has not questioned the accuracy of that decision in this respect, that there is nothing in the Agreed Case to warrant the conclusion that the broker's agency or employment extended any farther than the procurement of the policies, and that their agency and employment ended when the policies were executed and delivered, unless that delivery were conditioned and incomplete. This is decided on the authority of Grace *vs.* Insurance Co., 109 U. S., 278, and is held to be the law on the ground that it would be inconsistent with the general principles of the law of agency to hold that in case the policy remained in the hands of the agent after its procurement he thereby becomes a general agent of the insured, and this Court states the law that upon the receipt of the policy, the relation of depositor and depositary arises between the broker and his principal and the agency to procure insurance ceases.

It is conceded by the appellees that there never was notice to the insured of the cancellation of this policy. The learned counsel was asked before the trial judge below and has been asked again in this Court whether the company would have been liable if a fire had occurred between the 17th of April and the 27th of April; the 17th of April being the date contained in the policy from which the company insured for the period of one year, and the 27th being the date on which the alleged cancellation took place. It seems a fact not to be disputed that if a fire had occurred at any time during this period the liability of the company would have been beyond question, but to concede this fact is to admit the

delivery and existence of these policies and if valid, by the Agreed Case, the insured have never been notified of its cancellation, and therefore the obligation is still binding. To avoid this conclusion the counsel advanced the theory that there was no valid policy in this case and that the insurance never was effected. The more than sufficient reply to this contention is that had the special agent, on the 27th of April, agreed to *carry* the risk and not ordered its *cancellation*, in accordance with the theory of the appellee, the liability would, on that date, have attached for the first time and, although the premium was charged for a full year from the 17th, yet the policy was ineffective for a portion of that time and there was fraud upon the insured. It is true that under the particular facts in this case that time would have been only ten days but the visit of the special agent might have been deferred for three or even six months and yet, if the contention of the appellee be correct, the company could have collected a premium covering insurance for the period from the 17th of April although the policy was not in force until the agent's visit might occur, six months or more after the date of the policy. There is not an expression used in the Agreed Case or in the correspondence attached thereto which does not clearly contemplate the existence of a valid policy and the Court should be mindful of the fact that all the correspondence in this case occurred before the issues were clearly defined and while the transactions were still fresh in the mind of all parties thereto.

None of the cases cited by counsel on the question of conditional delivery of a parol contract involve a condition which is contradictory of the terms of that contract. Here it is sought to make a delivery on a condition contrary to the terms of the contract. For the contract says *insurance for the term of one year from the 17th of April, 1895*, while the entire argument of the appellee says insurance for such time from April 17, 1895, to April 17, 1896, as our special agent may

allow, but *on payment of a year's premium anyhow*. The policy says the *term* of one year in consideration of a year's premium. The contention says any time the insurer chooses, not to exceed a year for a year's premium.

The cases cited allow the introduction of parol evidence to show the non-existence of contracts not under seal, although executed, but specifically hold that the evidence cannot be admitted to contradict the terms of the contract, only to show there never was a contract. There is an argument from equity, convenience, or necessity in all the cases which has led to the conditions in each instance. Here no such facts exist. These brokers were within a square and a half of each other and in constant communication. Barrett had the authority to write these policies. When Barrett countersigned a policy, it became the obligation of the company. the policies were treated like all others issued by him on the books of the office The special agent regarded the contracts as valid, and treated them as such. All the correspondence between the parties at the time of the occurrence refers to these policies in language applicable only to valid subsisting contracts which with the other facts cited proves that Barrett wrote these policies from April 17th and then, when delivering them, attempted to alter their conditions in a way expressly provided against by the terms and conditions of his own contracts. The leading insurance case cited by the appellee, which they offered as conclusive of this case before the learned justice in the Circuit Court, is the Hainickell case, 111 N. Y., 390, and this Court has disposed of that case by emphasizing that the agreement is fully expressed in writing and *signed by both parties*.

As this Court has said in its opinion it is the nature and terms of the policies themselves which interferes with the grafting of the conditions in the manner contended for by the appellee. Delivery here to the agent to procure was delivery to the principal and by the very nature and terms

of the insurer's own contract that delivery could not be modified or controlled by parol agreements. Counsel further submit that the Agreed Case does not warrant the finding of a "conditional" delivery on the facts set forth and that the decision already rendered in this case is a correct statement of the law applicable to these facts and should not be altered.

HENRY P. BLAIR,
CORCORAN THOM,
Attorneys for Appellants.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

No. 79.
Brf. of Blair for Respondents.
Filed Nov. 6, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 79.

THE HARTFORD FIRE INSURANCE COMPANY, *Petitioner*,

vs.

ALBERT A. WILSON AND JOHN B. LARNER, *Respondents*.

Brief for Respondents.

HENRY P. BLAIR,
Counsel for Respondents.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 79.

THE HARTFORD FIRE INSURANCE COMPANY, *Petitioner*,

vs.

ALBERT A. WILSON AND JOHN B. LARNER, *Respondents.*

Brief for Respondents.

The point at issue in this case arises over two insurance policies in the possession of the assured at the time the loss occurred, payment whereof was refused by the insurance company on its interpretation of the effect of certain facts stated as the agreed case (Record, pp. 6-14, 17-22), whereby it is claimed that the policies sued on never took effect as binding contracts. Inadvertently, doubtless, both in the petition for the writ of certiorari and in the brief for petitioner filed in this court, the learned counsel do not include the correspondence between the parties and their agents and the policies, which correspondence (Record, pp. 10-14) and policies (Record, pp. 17-22) are by part of paragraph 12 of the agreed case specifically made a part of that case (Record, p. 9).

The view taken by the respondents, and which they maintain is the correct view in the light of the entire agreed case, is:

First: That the policies of insurance were recognized and treated as valid subsisting contracts at the time of their delivery by the agent of the insurance company to the agents of the assured whose agency was limited to procuring insurance.

Second: That being valid subsisting contracts the parties are bound by their agreement as reduced to writing in the policies.

Third: That any modification of the terms of the policies, which were at the time of their delivery subsisting contracts, cannot be enforced except that modification be made in accordance with the terms of the contract.

Fourth: That the alleged modification as to cancellation is at variance with the terms of the contracts as prescribed by the insurance company, and hence to be taken in their application most strongly against it.

Fifth: That the policies not having been cancelled in accordance with their terms were of necessity in force at the time of the fire which occurred within the year for which the policies ran and the assured is entitled to recover.

Each of these propositions will be considered in turn.

First: It is respectfully submitted that the court, under the agreed case, must find a valid subsisting contract resulting from the delivery of the policies as set out therein. Each clause and paragraph is to be given its full weight and effect in connection with all the other matter therein contained.

The condition under consideration is found in paragraph 2 of the agreed case (Record, p. 7), and provides that the policies be issued, which imports a valid contract by the very terms of the word itself, on a condition which can only be interpreted to affect their custody. The condition is that these policies shall be held by the agents of the assured and not delivered to their principals until the decision of the insurance company on the acceptance of the risk and be subject to immediate cancellation by notice of a rejection of the risk, the five days' notice in the policy conditions being waived.

By the terms of this condition it then appears that the condition attached only to the holding and delivery of the policies and did not in any way affect their validity as then subsisting contracts of insurance. It is true that the condition seeks to

modify the terms of these valid subsisting contracts, contrary to the manner prescribed by the provisions of the contracts. The agreed case cannot be made to go beyond a fair and reasonable interpretation of the language used throughout the entire case. If the condition precedent affected the validity of the contracts, and was in truth that the policy should not take effect, this court could then in the agreed case possibly find that condition of affairs on which the entire argument of the petitioner's counsel is based.

In support of the contention that it was only the manual possession of the policies affected by the condition precedent of the agreed case we turn first to an examination of the policies in question (Record, pp. 12–22) which discloses a standard policy, dated the seventeenth day of April, 1895, and insuring the property therein set out for the term of one year to the seventeenth day of April, 1896. Among the clauses contained in said policies are the following (Record, p. 21): "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto," etc., and (Record, p. 22) "In witness whereof, this company has executed and attested these presents this seventeenth day of April, 1895," and "This policy shall not be valid until countersigned by the duly authorized agent of the company at Washington, D. C." It is signed by the officers of the company by printed signatures and also has the following signature (Record, p. 22), "Countersigned by Thos. F. Barrett, Agent," who is conceded to be the duly authorized agent of the insurance company at Washington, D. C., with authority to write the proposed risk.

By the agreed case the delivery of these policies took place on their date, April 17, 1895, which date is twice repeated in the body of the policies.

From paragraph 2 (Record, p. 7) it appears that Barrett issued the policies and delivered the policies on condition that

the agents of the assured should hold them and not deliver them to their principals until the decision of the insurance company on the acceptance of the risk was duly had, and the policies should be subject to immediate cancellation (the 5 days' notice in the policy conditions being waived). On April 27, 1895, ten days after the date of the policies, the special agent of the company visited Washington and refused to carry (not take) the risk and ordered the cancellation of the policies. Barrett, the local agent, sent three times for the policies and immediately made the customary entry in such cases on the register where the policies were noted "Cancelled by order of the company" (Record, p. 7).

After the fire the agents of the assured to procure insurance wrote the assured for the return of "policies ordered cancelled shortly after they were issued" (Record, p. 10). Barrett, the agent of the company, on the date of, but after, the fire wrote (Record, p. 11), "The policies are dated April 17, 1895; that within a few days after they were written we received a request from the company for their immediate cancellation and return." And the assured's agent to procure insurance again wrote on the twentieth of May (Record, pp. 11-12), "The Underwriters' policies were ordered cancelled shortly after they were issued," etc.

The petitioner, in view of this language, all contained in the agreed case, endeavors to maintain that a condition precedent attached to the issue of these policies. The respondents maintain that the policies were issued, as all the correspondence says, and that the condition connected with the non-delivery to the principals was an attempted modification which, by the terms of the policy, was a provision, agreement, or condition to be endorsed thereon or added thereto, but which could in no way affect their rights under valid subsisting contracts. If a fire had occurred between April 17, 1895, the date of the policies, and April 27, 1895, the date of the visit by the special agent, who can doubt but that these policies

must have shared in paying the losses? Their terms protect the assured from April 17, 1895, to April 17, 1896, and how could the insurance company escape payment if a fire had occurred in these ten days? By its own stipulations in the agreed case it was necessary that its special agent should order the cancellation of the risk and decline to carry (not take) the same. If the policy was in force during these ten days then it was in force in accordance with all its terms and provisions. What was there left for Barrett to do, if the special agent had elected to carry (not take) the risk? The company, both by its special and local agent, was most careful to notify the assured's agents of the cancellation of the policies. If these had no existence why give attention to such a detail, or why order their cancellation if they were mere naked papers? Can one cancel that which has no existence? Can one waive the conditions in the policies for a five days' notice when those conditions are not in force? It is clear that the authority of the assured's agents extended only to procuring insurance. When they received these policies as valid subsisting contracts, which they must have been if they insured for ten days even, their custody was that of the assured. The contention of the petitioner that manual possession is not of necessity a determining factor with reference to the question whether a contract is in force or not is undoubtedly good law. So here the manual possession by the agents of the assured of the policies in question does not alter the fact that, when these policies by their own terms and conditions and by the facts surrounding their delivery became existing contracts, the rights under those terms and conditions accrued to the assured, not to their agents to procure insurance, and to the assured alone could notice of cancellation have properly been given.

Counsel on the other side are themselves begging the question when they attempt to make a conditional modification of the terms of the contract over into a condition precedent. No one can doubt the fact that Barrett wrote and delivered poli-

cies effective on April 17, 1895. If they were not effective on that date then both he and the assured's agents were dealing fraudulently with the assured for the premium, and the term of one year both ran from that date under the terms of the policies. No other conclusion seems reasonable from the entire agreed case than that Barrett, acting entirely within the scope of his authority, wrote and delivered two existing contracts, effective at the time of their delivery, to the agents of the assured whose authority was limited to procuring insurance. Coincident with that delivery he stipulated with the agents of assured for modifications or waivers of the terms of the contracts, which modifications did not effect the attaching of the risk at the time of the delivery, but only had reference to future dealings with the valid contracts then delivered. If these contracts were not to take effect until the special agent determined whether he would take the risk (the language of the agreed case is carry the risk) what object could there have been in writing and dating these policies on the 17th of April? Why not wait until the special agent came along and determined what the action of his company should be with reference to this risk. If these were merely nude compacts in the hands of the agents of the assured to procure insurance, what occasion was there for the special agent of the company to visit those agents for the purpose of informing them that his company refused to carry the risk and of ordering the immediate cancellation of these policies.

It is further to be considered that by the agreed case (Mem. following paragraph 7 and paragraph 8, Record, p. 8) no party connected with or interested in the assured had any knowledge of these facts prior to the fire. The terms of paragraph 2 of the agreed case do not state that Barrett delivered policies which did not take effect immediately, only that the policies were to be held by the agents to procure insurance and not delivered to their principal; but these policies so to be held and not delivered, were to be subject to immediate

cancellation and a waiver of the five days' notice in the policy conditions. Counsel for petitioner advanced the proposition that manual possession of a contract does not determine its existence. This is true and in this case the possession of the policies by parties whose agency was limited to procuring the insurance does not relieve the company from its obligations under the terms of the policies to the assured named therein.

Grace *vs.* Insurance Company, 109 U. S., 278.

Second: The proposition that these policies, being contracts reduced to writing and being valid subsisting contracts, cannot be modified by parol agreements made contrary to their provisions, does not require argument as it is elemental law and supported by all the authorities cited in support of the contentions of either party to this case.

Third: By the terms of the policies (Record, p. 21, last paragraph, and p. 22) it is provided that "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." From this provision it will be seen that the proper method of modifying the contract is provided for in the contract, and that the authority of the officer, agent, or other representative of the company is limited and he can only act to bind the company within the limits of that authority.

Fourth: It appears by the agreed case that the attempted modification of the policies was by a condition not endorsed thereon or added thereto, for it is admitted in paragraph 2 that the modification, such as it was, was verbal only, although it involved a waiver of the conditions of the policies (Record, p. 7), and it is further admitted that at no time prior to the fire had the assured, by agents for any purpose or otherwise, any knowledge, verbal or written, of the proposed modification of the terms of the policies and waiver of the five days' notice clause contained therein. These policies are elaborate documents prepared with greatest care by the insurance companies and the standard policy, involved in this case, is the result of careful preparation and with due consideration given to the judicial interpretations received by the various clauses. When a party attempts to reduce to writing an oral agreement it is elemental law that the terms of that agreement are to be construed most strictly against the party preparing the paper. The instruments involved in this case are the documents of the insurance company and their terms and conditions are therefore to be applied most strictly against the insurance company. It has provided the only way in which other provisions, agreements, and conditions included in the policies may be modified.

It has written policies for the term of one year from April 17, 1895, to April 17, 1896, and now seeks to impose a condition on those policies not endorsed thereon or added thereto, to wit: the condition that they were never effective; or if effective from April 17 to April 27, not effective thereafter by reason of a waiver of the five days' cancellation clause, which was another provision, agreement, or condition not endorsed thereon or added thereto.

Fifth: From the other arguments it follows that the policies having been issued on a condition simply affecting their manual possession, and not providing they should not be valid existing contracts, became valid contracts of insurance

and operative as to all their terms and conditions including those requiring notice to the insured in case of cancellation (Record, p. 19). By the terms of the agreed case the authority of the assured's agents terminated with procuring the insurance. It is conceded (Record, p. 8, Mem.) that no notice of cancellation was given to any party connected with or interested by mortgage or otherwise in the assured until after the fire occurred, which was during the term of one year covered by the provisions of the policy. The agreed case concedes that the assured is entitled to the full amount of the policies, provided the court finds in its favor, and it is respectfully submitted that the respondents here are entitled to an affirmance of the judgment of the Court of Appeals reversing the judgment of the Supreme Court of the District of Columbia.

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